Supreme Court, U.S.
FILED

94204 6 JUN 13 1995

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1994

ROY E. SCHROCK,

Petitioner,

vs.

TERRY L. MORRIS, Warden,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

FRANCIS X. COOK
Counsel of Record
PAYNE PAYNE & COOK
Attorneys for Petitioner
1535 Leader Building
526 Superior Avenue, N.E.
Cleveland, Ohio 44114-1401
(216) 241-5900

6831
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Where the petitioner, unrepresented by counsel, was induced by a state investigator to waive his legal rights and to confess to the truth of certain allegations of sexual misconduct made against him by his minor step-grandchildren, both by an implied promise that the investigation would go no further and by an implied threat that the step-grandchildren would be removed from their families if found to be lying, was the confession involuntary, and was the subsequent use of that confession against the defendant at trial so violative of his Fifth, Sixth, and Fourteenth Amendment Federal Constitution rights that his subsequent conviction should be struck down?

PARTIES TO THE PROCEEDING

The parties to this proceeding are those indicated in the caption of this petition for a writ of certiorari, Roy E. Schrock, the petitioner, and Terry L. Morris, the respondent, who is the former warden of Chillicothe Correctional Institute which maintains custody of the petitioner. The present warden of Chillicothe Correctional Institute is Fred McAninch.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Statement of Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
I. The United States Court of Appeals for the Sixth Circuit has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court of the United States.	5
II. The question presented is important.	10
Conclusion	13

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Brady v. United States, 397 U.S. 742 (1970) 10

Bram v. United States, 168 U.S. 532 (1897) 7, 8

Columbe v. Connecticut, 367 U.S. 568 (1961) 8

Gilham's Case, 1 Moody 194 8

Haynes v. State, 373 U.S. 503 (1963) 9

Hopt v. Utah, 110 U.S. 574 (1884) 6

Lynumn v. Illinois, 372 U.S. 528 (1963) 9

Machibroda v. United States, 368 U.S. 487 (1962) 9, 10

McCall v. Dutton, 863 F.2d 454 (6th Cir. 1988) 9

Miller v. Fenton, 474 U.S. 104 (1985) 5

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 8, 9

Spano v. State, 360 U.S. 315 (1959) 9

Teague v. Lane, 489 U.S. 288 (1989) 5

Wilson v. United States, 162 U.S. 613 (1896) 6, 7

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 3

28 U.S.C. § 2254(d) 5

United States Constitution Cited:

Fifth Amendment .....i, 2, 7, 10

Sixth Amendment .....i, 2, 10

Fourteenth Amendment .....i, 2

APPENDIX

Appendix A —Order Filed March 15, 1995 by the United States Court of Appeals for the Sixth Circuit, Affirming the Judgment of the District Court Denying the Petitioner a Writ of Habeas Corpus 1a

Appendix B —Order Filed July 19, 1994 by the United States District Court for the Northern District of Ohio, Eastern Division, Judge John M. Manos, Certifying Probable Cause for Petitioner to File an Appeal of the Order Denying His Petition for a Writ of Habeas Corpus 2a

Contents

Page

Appendix C — Order Filed April 5, 1994 by the United States District Court for the Northern District of Ohio, Eastern Division, Judge John M. Manos, Denying Petitioner's Petition for a Writ of Habeas Corpus and Dismissing Case 4a

Appendix D — Memorandum of Opinion Entered April 5, 1994 by the United States District Court for the Northern District of Ohio, Eastern Division, Judge John M. Manos, Denying Petitioner's Petition for a Writ of Habeas Corpus and Dismissing Case 5a

No.

In The

Supreme Court of the United States

October Term, 1994

ROY E. SCHROCK,

Petitioner,

vs.

TERRY L. MORRIS, Warden,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Roy E. Schrock, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on March 15, 1995, affirming the judgment of the District Court denying him a writ of habeas corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App. A, *infra,* 1a) is unreported.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, denying petitioner's petition for a writ of habeas corpus (App. D, *infra,* pp. 5a-15a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 15, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

STATEMENT OF THE CASE

This petition raises the fundamental constitutional question of whether the state can make use at trial of an extra-custodial confession by a criminal defendant which is induced by an implied promise of lenient treatment for himself and an implied threat to remove his step-grandchildren from their homes.

Petitioner Roy E. Schrock, is in state custody, serving more than twenty-two consecutive life sentences following conviction in a jury trial of sexual offenses against his three minor female step-grandchildren. Schrock was convicted of all counts of a forty-four count indictment, including twenty-two counts of rape, eleven counts of kidnapping, and eleven counts of gross sexual imposition, all involving the same three minors. He filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to 28 U.S.C. § 2254. The writ was denied, and Schrock appealed to the United States Court of Appeals for the Sixth Circuit, following certification of probable cause for appeal by the District Court. The United States Court of Appeals for the Sixth Circuit affirmed the denial of writ ordered by the District Court. Schrock now petitions this Court for review.

The chief evidence used by the state to convict Schrock of the sexual offenses against his step-grandchildren, for which no medical evidence was presented, was his confession, consisting of two audio-tape recordings of statements which he made to a state investigator at his sister's home, while he was not in custody. Both taped interviews were played for the jury in open court, were accepted into evidence, and were given to the jury along with a tape recorder in the jury room during deliberations.

Schrock testified that the investigator induced him to admit, on the tape, to the truth of incriminating facts, by an implied promise, made earlier, in unrecorded conversation during the first interview, that his admission of these facts would result in the matter not going any further and would also insure that his young accusers would not be removed from their families for lying. While the two tape recordings, which contain explicit references by the investigator to "talk . . . previous to turning on the tape," and to what "we had talked before about," and to the investigator's wish to "provide you [Schrock] with any consolation at all as far as your cooperation and honesty," are forty-five minutes and eight minutes in length, the investigator admits that his interviews with Schrock lasted considerably longer, approximately an hour and a half and a half hour, respectively. Also, the Miranda form signed by Schrock before the first interview, with the investigator as the only witness, states that it was signed at 12:19 p.m. Yet the investigator states on the tape that the interview began at 12:40 p.m. The investigator was unable to explain this twenty-one minute gap between the signing of the Miranda form and the beginning of the first interview.

The investigator also admitted at trial that he "probably" told Schrock, during unrecorded conversation, that it would be better for him if he confessed to the acts alleged by his accusers, although he denied that he told him directly that, if he confessed, it would be "all over." The investigator testified that he did not recall if he had stated to Schrock that it would be better for the girls if he admitted the allegations. He did recall, however, that, during the interview, Schrock expressed concern for the children.

Schrock has consistently maintained, since his "confession," that no sexual offenses involving him actually took place. He believes that his step-children put their own young children up to accusing him, as revenge for his having inherited all of their deceased mother's property.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

The decision below fails to address the important and substantial question of the burden which the state bears of showing that a non-custodial waiver of rights and confession by a criminal defendant was freely and voluntarily made, without compulsion of any sort, where there is evidence on the record that the waiver and confession were induced by an implied promise of lenient treatment for the defendant and by an implied threat to remove his step-grandchildren from their families.

This Court, in *Miller v. Fenton,* 474 U.S. 104 (1985), and again in *Teague v. Lane,* 489 U.S. 288 (1989), has firmly reiterated its long-standing position that the ultimate question of the voluntariness of a confession is not an issue of fact entitled to 28 U.S.C. § 2254(d) presumption, but is a legal question meriting plenary federal review. Yet the Sixth Circuit Court of Appeals, in affirming the denial of a writ of habeas corpus for petitioner Schrock, supports the conclusion of the District Court (App. D, 14a-15a) that, because the state courts had held that Schrock's confession was freely and voluntarily given, pursuant to 28 U.S.C. § 2254(d), Schrock has the burden of proving that the factual findings by the state court were not correct. The District Court based its decision on the fact that the state courts had considered the same operative facts brought forward by Schrock in petitioning for habeas corpus, "and concluded that 'under the totality of the circumstances,' petitioner's statements were given

freely and voluntarily without any compelling or deceptive influence."

A plenary review of the issue of the voluntariness of Schrock's confession, however, reveals that the very tapes which the prosecution used so effectively against him at trial contain evidence that Schrock was not willing to make admissions until reminded by the investigator of what they had discussed before turning on the tapes. The tapes contain clear references by the investigator to consideration which Schrock would receive in exchange for his admissions.

The decision of the Sixth Circuit Court of Appeals conflicts with decisions of this Court which have stood for one hundred years.

In *Wilson v. United States,* 162 U.S. 613 at 622-623 (1896), speaking through Mr. Chief Justice Fuller, this Court held that:

> [A]ll verbal admissions must be received with caution, though free, deliberate, and voluntary confessions are entitled to great weight. But they are inadmissible if made under any threat, promise, or encouragement of any hope or favor.
>
> . . .
>
> In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort.

Mr. Justice Harlan, in the earlier case of *Hopt v. Utah,* 110 U.S. 574 at 584 (1884) had pointed out, regarding the weight to be given confessions that:

> the presumption upon which weight is given to such evidence, namely that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority touching the charge preferred, or because of a threat or promise, by or in the presence of such person, which, operating upon the fears or hopes of the accused in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.

This Court's landmark decision in *Bram v. United States*, 168 U.S. 532 (1897) explored the history of English law on the issue of the voluntariness of confessions, pointing out, at 548, that the framers of the Fifth Amendment to the Constitution had intimate knowledge of the well settled English requirement of admissibility which Chief Justice Fuller had enunciated in *Wilson, supra*, that confessions be "made freely, voluntarily, and without compulsion or inducement of any kind."

It was obvious to this Court in *Bram, supra*, that agents of the state can extract a confession from a suspect involuntarily not only by resort to threats causing fear, but also by resort to promises causing hope. The meaning of "voluntary" in this context was also seen as crucial.

> The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement

> were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that, from causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent.

This rule carefully preserves the legal meaning of the term "voluntary," as opposed to its literal meaning. Mr. Justice Stewart pointed out this important distinction in *Schneckloth v. Bustamonte,* 412 U.S. 218, at 224 (1973), citing Mr. Justice Frankfurter in *Columbe v. Connecticut,* 367 U.S. 568, at 604-605 (1961). There Mr. Justice Stewart noted that the notion of voluntariness cannot be taken literally to mean a "knowing" choice; otherwise even incriminating statements made under brutal treatment are "voluntary," in the sense that they represent a choice of alternatives. Rather, the legal meaning of the word "voluntary" concerns not the speaking of the words of confession, but the accused's reason for speaking them.

Prior to listing many English cases in which confessions induced by promises had been held inadmissible, this Court in *Bram,* at 547, quotes with favor a note (note to *Gilham's Case*, 1 Moody, 194, 195) which explains the connection between safeguarding the voluntariness of confessions and the preservation of truth.

> The human mind, under pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as

> different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, ... is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction.

It is *Schneckloth, supra,* which sets down the key issue in confession cases of whether a defendant's will is "overborne" by coercive police activity. Yet the case which the Sixth Circuit Court of Appeals quoted in oral argument as supporting its decision to affirm, *McCall v. Dutton,* 863 F.2d 454 (6th Cir. 1988), treats the issue of the overbearing of the defendant's will exclusively from the point of view of threats inducing fear, and not in terms of promises inducing hope.

While the state investigator also used implied threats against Schrock to induce him to confess, the threats did not involve Schrock directly. They were threats regarding removal of Schrock's step-grandchildren from their families. Under the authority of *Lynumn v. Illinois,* 372 U.S. 528 (1963) and *Spano v. State,* 360 U.S. 315 (1959), these threats alone are sufficient to render Schrock's subsequent confession involuntary. The investigator's failure to remember at trial whether or not he had assured Schrock that the step-grandchildren would benefit by his confession did not repudiate Schrock's testimony regarding what he was told. *Haynes v. State,* 373 U.S. 503 (1963).

Although many opinions of this Court have taken up the issue of the voluntariness of pleas induced by promises of lenient sentencing, such as *Machibroda v. United States,* 368 U.S. 487

(1962) and *Brady v. United States*, 397 U.S. 742 (1970), there seems to be no recent opinion directly reaching the issue of the voluntariness of confessions induced by promises of lenient treatment. Such an opinion is needed.

II.

THE QUESTION PRESENTED IS IMPORTANT.

The question presented by this case is important because it involves a commonly used police procedure[1] which violates the federal constitutional rights of accused citizens. An unrepresented criminal suspect like Schrock is induced, in a non-custodial situation, by a state agent, to confess to having engaged in certain criminal behavior, under the implied promise that he will be better off if he confesses.[2] The agent is not referring to the suspect being spiritually, emotionally, or mentally better off. The agent's clear implication is that the suspect will be *legally* better off if he confesses. The agent alludes to his "going to see the boss" on behalf of the suspect, in order to assure "the boss" that the suspect was truthful and cooperative. The boss is clearly the legal authority whom the agent represents. The implication is that lenient treatment awaits the suspect who confesses, and harsh treatment awaits the suspect who does not confess.

---

1. That police routinely make use of this tactic during their criminal investigations was acknowledged by members of the Sixth Circuit panel during oral argument.

2. Since the situation is non-custodial, Miranda warnings are not required. The warnings, however, are usually given by the state agent anyway, as they were to Schrock, in an excess of caution, so that the documented waiver of the suspect's Fifth and Sixth Amendment rights are also part of the bargain. Thus, induced by the promise of lenient treatment made by the state agent, the suspect divests himself of his right to counsel and of his right not to incriminate himself, just in time to make his confession.

When the state investigation concerns the matter of sexual abuse, particularly of children, and even more particularly of close relatives of the suspect, as in Schrock's case, the scheme is even more effective. This is true for several reasons.

First, while most ordinary people would recognize the seriousness of accusations involving a crime such as murder, very few would be sophisticated enough to know that certain sexual behaviors engaged in with minors, regardless of consent, constitute the serious crime of rape. In investigations regarding sexual acts with minors, a suspect may not even realize that the facts to which he is asked to confess comprise the elements of a crime. The agent typically minimizes the legal implications of the behavior for the unrepresented suspect.

Second, not understanding the seriousness of the matter criminally, the suspect may easily be convinced by the agent's implication that he himself (or his immediate "boss") has the discretionary authority either to pursue or to drop the investigation. This would hardly be believable in the case of the usual murder or rape investigation.

Third, the very accusation of sexual abuse of minors, with its attendant opprobrium in society and the media, can be so devastating for an accused[3] that he is willing to go to extraordinary lengths to end such an investigation, even if it means confessing to something he did not do.

State and federal judges in criminal cases are most careful, before accepting a plea of guilty from a defendant, to have placed on the record the statement of the defendant that he has not been

---

3. It is common experience that persons accused of such crimes are considered by society to be guilty until proven innocent and, even then, tainted with guilt.

subject to threats or promises of any kind in entering his plea.[4] This is true even though the plea is entered in the presence of the court, where the circumstances and demeanor of the defendant can be observed by the judge. Yet, when police seek to elicit a confession from a defendant outside the presence of the court, where circumstances and demeanor cannot be observed, in the absence of counsel, a confession, which might well seal the defendant's fate, is able to be procured not by threats or beatings, but by promises that "it will be better for you if you confess."

In a criminal case in which the commission of a crime by someone is clear, such as a gruesome murder, the violation of an accused citizen's constitutional rights can result in conviction of an innocent person for the crime. This danger is magnified, however, when the crime involved is sexual abuse, for which there may well be no evidence other than the testimony of victims and witnesses. In such a case, a crime may not have occurred at all (*i.e.* the victim has lied), and yet, an innocent person will be convicted and punished.

---

4. When taking pleas, judges seem to inquire more about promises than threats, an indication that promises are more likely to be used than threats in coercing pleas from defendants.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

FRANCIS X. COOK
Counsel of Record
PAYNE PAYNE & COOK
Attorneys for Petitioner
1535 Leader Building
526 Superior Avenue, N.E.
Cleveland, Ohio 44114-1401
(216) 241-5900

APPENDIX A — ORDER FILED MARCH 15, 1995 BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AFFIRMING THE JUDGMENT OF THE DISTRICT COURT DENYING THE PETITIONER A WRIT OF HABEAS CORPUS

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No: 94-3538

ROY E. SCHROCK

Petitioner-Appellant

v.

TERRY L. MORRIS, Warden

Respondent-Appellee

ORDER

BEFORE: LIVELY, RYAN and DAUGHTREY, Circuit Judges.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — ORDER FILED JULY 19, 1994 BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, JUDGE JOHN M. MANOS, CERTIFYING PROBABLE CAUSE FOR PETITIONER TO FILE AN APPEAL OF THE ORDER DENYING HIS PETITION FOR A WRIT OF HABEAS CORPUS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:92CV2402

Judge John M. Manos

ROY E. SCHROCK,

Petitioner,

v.

TERRY L. MORRIS, Warden

Respondent.

ORDER

On November 12, 1992, Roy E. Schrock, petitioner, filed for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On April 5, 1994, the court denied the writ.

Pursuant to 28 U.S.C. § 2253:

An appeal may not be taken to the court of appeals from the

> final order in a habeas corpus proceeding, . . . unless the . . . the judge who issued the order . . . issues a certificate of probable cause.

There is probable cause for the petitioner to file an appeal of the order denying his petition for a writ of habeas corpus.

IT IS SO ORDERED.

s/ John M. Manos
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER FILED APRIL 5, 1994 BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, JUDGE JOHN M. MANOS, DENYING PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS AND DISMISSING CASE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:92CV2402

Judge John M. Manos

ROY E. SCHROCK,

Plaintiff,

v.

TERRY L. MORRIS, Warden,

Defendant.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, petitioner's writ of habeas corpus is denied.

IS SO ORDERED.

s/ John M. Manos
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM OF OPINION ENTERED APRIL 5, 1994 BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, JUDGE JOHN M. MANOS, DENYING PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS AND DISMISSING CASE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:92CV2402

Judge John M. Manos

ROY E. SCHROCK,

Petitioner,

v.

TERRY L. MORRIS, Warden

Respondent.

MEMORANDUM OF OPINION

On November 12, 1992, Roy E. Schrock, petitioner, filed for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On October 6, 1993, a Magistrate Judge issued a Report and Recommendation advising that the petition be dismissed. On October 18, 1993, petitioner filed an Objection to the Report and Recommendation. For the following reasons, the petition for a writ of habeas corpus is denied.

Appendix D

I.

On December 23, 1988, petitioner was indicted in the Court of Common Pleas for Lake County, Ohio. The indictment charged him with 22 counts of rape, 11 counts of gross sexual imposition and 11 counts of kidnapping, all involving three of his step-grandchildren.

On September 6, 1988, Randy Tevepaugh, an investigator with the Geauga County Prosecutor's Office, interviewed petitioner. The interview took place at the home of the petitioner's sister. A second interview was held on September 12, 1988.

Prior to trial, petitioner moved to suppress two statements he made to Mr. Tevepaugh. He charged that the statements were made after the investigator assured him that he would not be prosecuted. The trial court held a hearing and denied the motion.

Petitioner was tried and both statements taken by Tevepaugh were received in evidence. A jury found him guilty on all charges and the court sentenced him to life imprisonment on each of the 22 rape counts; 10 to 25 years on each of the 11 kidnapping counts; and two years on each of the 11 gross sexual imposition counts, all sentences to run consecutively.

Petitioner appealed to the Eleventh District Court of Appeals (Lake County), charging that the trial court should have granted his motion to suppress.[1] On November 12, 1991, the Court of Appeals affirmed the conviction.

---

1. Petitioner also charged that the court erred in not granting his motion for acquittal on the kidnapping counts. This issue is not before this court.

Appendix D

Pursuant to the Ohio Supreme Court Rules of Practice, to perfect an appeal from a Court of Appeals to the Ohio Supreme Court, a party must file a notice of appeal in the Court of Appeals within thirty days of entry of judgment. Petitioner filed a Motion for Leave to File Notice of Appeal Instanter and a Notice of Appeal in the Court of Appeals, on December 13, 1991, thirty-one days after judgment. On December 20, 1991, the Court of Appeals denied the motion, stating:

> Appellant's Motion for Leave to File his Notice of Appeal to the Supreme Court of Ohio Instanter is hereby overruled.

On January 10, 1992, petitioner filed a motion for delayed appeal and a memorandum in support of jurisdiction in the Ohio Supreme Court. He asserted that his late filing was the excusable neglect of his attorney. The State responded with a motion to dismiss for lack of prosecution.

On April 15, 1992, the Supreme Court entered judgment dismissing the appeal:

> Upon consideration of the motion for leave to appeal from the Court of Appeals for Lake County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

This entry mirrors the Court's form entry for most cases in which leave to appeal is denied.

Appendix D

On November 12, 1992, petitioner filed for a writ of habeas corpus. He raises three grounds in his petition:

> (1) Conviction obtained by use of coerced confession.
>
> (2) Conviction obtained by a violation of the privilege against self-incrimination.
>
> (3) Conviction obtained through denial of the right to counsel.

II.

The Magistrate recommends that the petition be dismissed because the petitioner procedurally defaulted on his claim by filing his notice of appeal in the Court of Appeals thirty-one days after entry of judgment.

The independent and adequate state ground doctrine bars federal habeas review when a state court declines to address a prisoner's federal claims because the prisoner has not met a state procedural requirement. *Coleman v. Thompson,* 111 S.Ct. 2546, 2554 (1991).

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to

> consider the claims will result in a fundamental miscarriage of justice.

Id., 111 S.Ct. at 2565.

The Sixth Circuit has enunciated a four-part test to determine if federal habeas review is precluded because of a state procedural default:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction.
>
> Third, the court must determine whether the state procedural forfeiture is an adequate and independent state ground on which the state can rely to foreclose review of a constitutional issue.
>
> Fourth, the petitioner must demonstrate that there was cause for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

See Bagby v. Sowders, 853 F.2d 1340, 1347-48 (6th Cir. 1988); *see also Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).

The procedure for appeal from Ohio Courts of Appeals to the

Appendix D

Ohio Supreme Court is governed by the Ohio Supreme Court Rules of Practice (Supreme Court Rules). Rule I, Section 1 states:

> (A) The notice of appeal from the Court of Appeals must be filed in the court from which the case is appealed within thirty days from entry of the judgment or final order appealed from. . . .
>
> (B) A copy of that notice of appeal must be filed or offered for filing in the Supreme Court of Ohio not later than thirty days after the filing of such notice in the Court of Appeals. The copy of the notice of appeal shall show the date of filing time-stamped by the Court of Appeals.

Petitioner notes that pursuant to Supreme Court Rule II, Section 1, the Supreme court *may* dismiss (for lack of prosecution) an appeal that does not comport with the procedures in Rule I. Rule II, Section 1 provides:

> **Effect of Failure to Comply With Required Filing of Notice of Appeal in Supreme Court.** If a copy of the notice of appeal is not filed or offered for filing in the Supreme Court in compliance with Sections 1, 2, 3, 5, 6, and 7 of Rule I, the Supreme Court may refuse to accept such copy for filing or may dismiss the appeal, either on its own motion or on motion of a party, for lack of prosecution.

Appendix D

Rule II, Section 8 provides the procedure to file a late notice of appeal in a felony case:

> **Procedure on Appeal in Felony Case Where Notice of Appeal is Not Filed as Specified.** In those cases where the time has expired for the filing in the Court of Appeals or in the Supreme Court of a notice of appeal in a felony case, adequate reasons for the delay in such filing must be given and, where based upon facts, those facts must be evidenced by affidavit or deposition filed in support of such motion for leave to appeal.

Petitioner admits that he did not file a notice of appeal in the Court of Appeals within the thirty day period and that this rule is an adequate and independent state ground on which the State can rely to foreclose review of a constitutional issue. However, he argues that "the Supreme Court of Ohio treated his appeal . . . exactly as it would have if Rule I Section l(A) and Section l(B) had been followed to the letter . . . and, therefore, did not rely on the procedural bar as an independent basis for its disposition of the case."

The Supreme Court's entry did not dismiss the case "for lack of prosecution," pursuant to Rule II, Section 1. Rather, the Court dismissed the case "for the reason that no substantial constitutional question exists therein."

The State argues that the "unreasoned" entry by the Supreme Court should be "looked through" and hold no precedential value. *See Ylst v. Nunnemaker,* 111 S.Ct. 2590 (1991). Therefore, the State reasons that the decision of the Court of Appeals

denying leave to file a late notice of appeal is the final determination by the state courts, and the procedural default was applied against petitioner. In *Ylst,* the Court held that if a state court denies an appeal by applying a procedural rule, and a higher appellate court affirms with an unreasoned opinion, a federal habeas court is to "look through" the higher court's opinion and assume that it applied the procedural rule against the petitioner. In this case, however, the Court of Appeals did not dismiss petitioner's appeal because of a procedural default.[2] Therefore, because the Court of Appeals denied petitioner's appeal on the merits, the "unreasoned opinion" of the Supreme Court cannot be construed to affirm a lower court's imposition of a procedural default.

Accordingly, the Supreme Court granted petitioner's motion for delayed appeal, pursuant to Rule II, Section 8, and dismissed the case on the merits, and the independent and adequate state ground doctrine does not apply.

III.

Petitioner argues that his Fifth and Sixth Amendment rights were violated by the admission at trial of his confession to Investigator Tevepaugh.

At the suppression hearing, Tevepaugh testified that on September 5, 1988, he telephoned petitioner, who was staying at his sister's home, and requested an interview. Petitioner consented.

---

2. Although the Court of Appeals denied petitioner's motion to file a late appeal, it denied his appeal on the merits, not because of a procedural default.

Appendix D

On September 6, 1988, Tevepaugh met petitioner at his sister's home. He introduced himself as an investigator and stated that he was responsible for investigating alleged child sexual abuse cases. Tevepaugh testified that petitioner was not informed that a warrant had been issued for his arrest, or that he might be charged with sex abuse crimes.

Petitioner consented to have their conversation tape-recorded and Tevepaugh advised him of his *Miranda* rights. Petitioner signed a rights and waiver form at 12:19 p.m. The discussion of *Miranda* rights is not on the tapes.

The tape-recording of the interview begins with Tevepaugh indicating the date and 1240 hours (12:40 p.m.) as the time. The recording continues:

> My interview with Mr. Schrock stems from an allegation made against Mr. Schrock by numerous juvenile females in regards to sexual abuse at his Mentor address on Willobrick, and also at 510 Beechwood Drive, Newbury, Ohio in Geauga County. Mr. Schrock has been advised of his constitutional rights and has signed and acknowledged the rights form and the waiver form.

The interview concluded at 1:25 p.m. Tevepaugh could not explain what transpired between the time petitioner signed his waiver and the start of the tape, however, he testified that, prior to starting the tape recorder, he did not ask any questions regarding the allegations against petitioner.

Appendix D

On September 12, 1988, a second interview occurred at the home of petitioner's sister. Tevepaugh reminded petitioner of his rights and told him that they were still in effect, and petitioner acknowledged his waiver.

Although petitioner concedes that he signed a *Miranda* rights and waiver form before the interview with Tevepaugh, he argues that he did so under an implied promise of lenient treatment. Therefore, he argues that his confession was not voluntary.

At the suppression hearing, petitioner testified that he understood his *Miranda* rights, waived them, and consented to make a statement. However, he testified that he did not understand the seriousness of the allegations and that he was under the impression that, if he would make a statement on tape, that "would be the end of it." On cross-examination, he admitted that Tevepaugh never made direct promises of lenient treatment in exchange for his confession.

The state courts held that the confessions made by the petitioner to Tevepaugh were freely and voluntarily given. Pursuant to 28 U.S.C. § 2254(d), a petitioner has the burden of proving that the factual findings by a state court are not correct. Petitioner asserts that "the factual determination by the state court in his case that he voluntarily waived his constitutional rights to counsel and against self-incrimination was not fairly supported by the record. . . ."

Petitioner stresses that his discussion with Tevepaugh about his rights is not on the tape-recording and that there is no explanation of what occurred between his signing the waiver and the start of the tape. However, the state court considered these

operative facts along with the testimony of petitioner and Tevepaugh, and concluded that under the "totality of the circumstances," petitioner's statements were given freely and voluntarily without any compelling or deceptive influence. *See U.S. v. Mendoza-Cecelia,* 963 F.2d 1467, 1475 (11th Cir. 1992), *citing, Colorado v. Connelly,* 479 U.S. 157, 107 S.Ct. 515, 523 (1986). Furthermore, as noted by the Magistrate Judge in the Report and Recommendation, petitioner has brought no additional facts to this court's attention which might alter that conclusion. Accordingly, the facts developed by the state court record support the finding that petitioner's statement was voluntary and was not coerced by guarantees of lenient treatment, and the petition for a writ of habeas corpus is denied.

IT IS SO ORDERED.

s/ John M. Manos
UNITED STATES DISTRICT JUDGE